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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

GREGORY LEONARD GONZALES,

Defendant and Appellant.

F077894

(Super. Ct. No. F18902792)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Michael G. Idiart, Judge.

Kendall Dawson Wasley, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Darren K. Indermill and Cameron M. Goodman, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Peña, Acting P.J., Snauffer, J., and DeSantos, J.

INTRODUCTION

Appellant Gregory Leonard Gonzales failed to register as a sex offender following his release from incarceration. He was arrested nearly three months after his release and pleaded no contest to the offense. At sentencing, the trial court ordered testing for the presence of AIDS. On appeal, Gonzales seeks to vacate this order. Respondent concedes that the order should be vacated, because Gonzales was not convicted under a statute which mandates AIDS testing. In subsequent proceedings, the trial court vacated its order. As modified, the judgment is affirmed.

STATEMENT OF THE CASE

On April 27, 2018,¹ the Fresno County District Attorney filed a complaint alleging Gonzales committed felony failure to register or re-register pursuant to Penal Code² section 290, subdivision (b) upon release from incarceration (§ 290.015, subd. (a)). The complaint alleged Gonzales had suffered a prior conviction under section 290.015, subdivision (a). The complaint further alleged a prior strike (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and three prior prison terms after which Gonzales failed to remain free from custody for at least five years (§ 667.5, subd. (b)).

On May 11, Gonzales pleaded no contest pursuant to *People v. West*³ and admitted the prior strike in exchange for a 32-month lid offered by the prosecutor.⁴ On June 18, Gonzales filed a *Romero*⁵ motion to request dismissal of his strike prior. The following day, the court denied the *Romero* motion.

¹ References to dates are to dates in 2018 unless otherwise stated.

² Undesignated statutory references are to the Penal Code.

³ *People v. West* (1970) 3 Cal.3d 595.

⁴ The plea agreement did not contemplate the three prior prison term allegations.

⁵ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

The court then sentenced Gonzales pursuant to the plea agreement to the lower term of 16 months, doubled by the strike prior to two years eight months, imposed various fines and fees,⁶ and ordered AIDS testing pursuant to section 1202.1.

Gonzales filed a notice of appeal on August 1.

STATEMENT OF FACTS⁷

On January 29, Gonzales was released from prison and was told to report to the Fresno parole office the following day. He failed to do so. On February 13, an investigation was initiated.⁸ Gonzales was arrested on a revocation of parole warrant on April 25.

DISCUSSION

Gonzales contends that the trial court's order requiring AIDS testing was unauthorized and must be vacated. Respondent agrees. Gonzales's current offense is not listed in the statute as one mandating AIDS testing.

Generally, a person may not be compelled to submit to a test for the presence of human immunodeficiency virus (HIV). (See Health & Saf. Code, § 120975.) However, one convicted of a specified sexual offense must "submit to a blood or oral mucosal transudate saliva test for evidence of antibodies to the probable causative agent of

⁶ On February 27, 2019, Gonzales's appellate counsel wrote the trial court directly in the "spirit of *People v. Fares* (1993) 16 Cal.App.4th 954 and *People v. Clavel* (2002) 103 Cal.App.4th 516" to request Gonzales's fines and fees be vacated following *People v. Dueñas* (2019) 30 Cal.App.5th 1157. On March 26, 2019, the trial court vacated Gonzales's restitution (§ 1202.4) and parole revocation (§ 1202.45) fines and stayed his court operations (§ 1465.8) and criminal conviction (Gov. Code, § 70373) fees.

⁷ The facts relevant to this appeal stem solely from Fresno County Sheriff's Department crime report No. 18-2495, as summarized in Gonzales's probation report. The trial court found a sufficient factual basis for his no contest plea.

⁸ The assigned detective determined Gonzales had failed to register after an earlier release from prison in September 2015.

acquired immunodeficiency syndrome (AIDS) within 180 days of the date of conviction.” (§ 1202.1, subd. (a).) The statute requires testing for the following sexual offenses:

“(1) Rape in violation of section 261 or 264.1.

“(2) Unlawful intercourse with a person under 18 years of age in violation of section 261.5 or 266c.

“(3) Rape of a spouse in violation of section 262 or 264.1.

“(4) Sodomy in violation of section 266c or 286.

“(5) Oral copulation in violation of section 266c or 287, or former section 288a.” (§ 1202.1, subd. (e).)

Moreover, “if the court finds that there is probable cause to believe that blood, semen, or any other bodily fluid capable of transmitting HIV has been transferred from the defendant to the victim,” then the statute requires testing for these sexual offenses:

“(i) Sexual penetration in violation of section 264.1, 266c, or 289.

“(ii) Aggravated sexual assault of a child in violation of section 269.

“(iii) Lewd or lascivious conduct with a child in violation of section 288.

“(iv) Continuous sexual abuse of a child in violation of section 288.5.

“(v) The attempt to commit any offense described in clauses (i) to (iv), inclusive.” (§ 1202.1, subd. (e)(6)(A).)

When the compulsory AIDS test follows a sexual offense for which probable cause is required, a defendant’s failure to object to the lack of an express finding of probable cause forfeits the issue on appeal. (See *People v. Butler* (2003) 31 Cal.4th 1119, 1125-1126 (*Butler*); *People v. Stowell* (2003) 31 Cal.4th 1107, 1113-1116.)

However, even without an objection, an appellate court may review the sufficiency of the evidence to support the trial court’s probable cause finding. (*Butler*, at pp. 1126-1129.)

An appellate court may similarly review an HIV testing order without objection when the defendant has not been convicted of an offense listed in section 1202.1,

subdivision (e)(6). (See *Butler*, at p. 1126, citing *People v. Green* (1996) 50 Cal.App.4th 1076, 1090 and *People v. Jillie* (1992) 8 Cal.App.4th 960, 963.)

Here, Gonzales did not object to the trial court's imposition of an AIDS testing order. However, section 1202.1, subdivision (e), does not include a violation of section 290.015, subdivision (a) as an enumerated offense for which AIDS testing is required, with or without a probable cause finding. The trial court's imposition of an AIDS testing order expressly contravened the Penal Code.

By minute order dated April 26, 2019, the trial court vacated the AIDS testing order, and an amended abstract of judgment was filed on May 2, 2019 reflecting the change.⁹ As the requested relief has been granted by the trial court, no further relief is warranted.

DISPOSITION

The judgment is affirmed.

⁹ The trial court appears to have vacated the order and corrected the abstract on its own motion after receiving the parties' appellate briefing.